



Order 2001-12-19

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 27th day of December, 2001

CANADA 3000

**Violations of 49 U.S.C. §§41301 and
41712 and 14 CFR Parts 212, 216, and
380**

SERVED DEC. 27, 2001

CONSENT ORDER

By this order, we find that Canada 3000, a Canadian air carrier that holds permit authority issued by this Department, has violated 49 U.S.C. §41301, 14 CFR Parts 212, 216, and 380, and 49 U.S.C. §41712 by holding out and engaging in unauthorized air transportation. We order Canada 3000 to cease and desist from such violations, as discussed below. This order also assesses a civil penalty of \$30,000, payable if Canada 3000 should resume operating to or from the United States.

Foreign air carriers are required by 49 U.S.C. §41301 to hold authority from the Department in order to engage in foreign air transportation. Canada 3000's foreign air carrier permit authorizes it "to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations of the Department's regulations governing charters" (Order 98-11-12 (November 16, 1998)). The Department's Charter Rules for U.S. and Foreign Direct Air Carriers, 14 CFR Part 212, require Canada 3000 to obtain a statement of authorization for each fifth-freedom charter flight to or from the United States (§212.9(b)(1)). Additionally, the Department's rules for Commingling of Blind Sector Traffic by Foreign Air Carriers, 14 CFR Part 216, require prior authorization in order for Canada 3000 to commingle blind-sector Canada-Australia passengers with Canada-Hawaii passengers (§216.3). The

Department's Public Charter Rules, 14 CFR Part 380, prohibit Canada 3000 from selling, holding out, or advertising public charter flights for which the Department has not accepted a public charter prospectus (§380.25). Engaging in foreign air transportation without the required authorizations not only violates §41301 and the associated regulations but also 49 U.S.C. §41712, which prohibits unfair and deceptive practices and unfair methods of competition.

On September 19, 2000, Canada 3000 obtained a statement of authorization for round-trip charter flights to be operated between October 31, 2000, and May 1, 2001. The carrier also obtained authority to commingle blind-sector passengers on these flights and filed a public charter prospectus covering them. The flights were all to begin in Vancouver, proceed to Honolulu, and return to these points in reverse order after also stopping at Rarotonga, Auckland, Sydney, and Brisbane, with half of the flights following this order for these latter four points and half following the reverse order. The statement of authorization was effective until May 4, 2001, and the carrier operated a number of flights under its auspices.

Without securing additional authorization or submitting a prospectus for any subsequent flights involving Honolulu, Canada 3000 nonetheless operated roundtrip charter flights once a week after May 4 between Hawaii and Australia (specifically, from Vancouver to Honolulu to Sydney to Brisbane to Sydney to Honolulu to Vancouver), and it marketed and sold seats on these flights to the public. Between May 4 and July 20, 2001, when the Department approved Canada 3000's applications for authorization to operate and commingle passengers on additional round-trip flights on this routing through November 1, 2001, and also accepted its prospectus, the carrier operated 11 roundtrip flights with Airbus A-330-200 aircraft configured to carry 327 passengers. It carried a total of 486 local fifth-freedom passengers on southbound flights between Honolulu and Sydney and Brisbane and 596 local fifth-freedom passengers on northbound flights from Sydney and Brisbane to Honolulu. It also carried cargo on these flights. Furthermore, Canada 3000 advertised these flights once a week during this period in two Australian newspapers,¹ listed the flights in the charter flight schedules on its Internet web site, and sold seats on future flights to a total of 458 southbound and 293 northbound fifth-freedom passengers. By engaging in these activities without the proper authorization, Canada 3000 violated the regulatory and statutory provisions detailed above.

¹ Australian travel agents may have advertised Canada 3000's unauthorized flights as well.

Canada 3000 states in mitigation that it very much regrets holding out and engaging in foreign charter air transportation without authorization, that it takes its responsibility to comply with U.S. Federal aviation statutes and regulations very seriously, and that it has taken steps to guard against future lapses. It characterizes its failure to obtain authorization to operate these charter flights after May 4 as unintentional and as inconsistent with its longstanding record of compliance with all applicable U.S. laws during over 12 years of transborder and fifth-freedom scheduled and charter operations serving the United States. Once alerted to its oversight by the Office of Aviation Enforcement and Proceedings' ("Enforcement Office's") letter of July 11, 2001, Canada 3000 quickly prepared and submitted the necessary applications under Parts 212 and 216 and public charter prospectus under Part 380 for subsequent flights; the latter was accepted and the former approved, effective July 20.² The carrier states that approximately 95 percent of the local fifth-freedom passengers it carried on its unauthorized flights originated in Australia rather than Hawaii and attributes this to its having only advertised these flights in Australia. It contends that its flights were primarily devoted to the Vancouver-Hawaii and Vancouver-Australia markets and that they added only a *de minimis* increment to the total weekly seating capacity offered by U.S. and Australian carriers between Honolulu and Sydney and Brisbane.³ It denies that it attempted or intended to engage in any "deceptive practice" within the meaning of 49 U.S.C. §41712.

We take the obligation of foreign air carriers to comply with the statutes and regulations governing their operations to and from the United States very seriously. Therefore, despite both the mitigating circumstances asserted by Canada 3000 and the alacrity of its remedial response to the Enforcement Office's letter, we find that its violations warrant enforcement action. Canada 3000 engaged in unauthorized foreign transportation for some 75 days, during which time it carried over 1,000 passengers as well as cargo and sold future transportation to over 750 passengers. It also ran advertisements that its lack of authority rendered deceptive; in all likelihood, these advertisements unfairly and deceptively diverted business from carriers that were authorized to serve Australia.

² Canada 3000's authority to operate these charter flights extended until November 1, 2001.

³ According to Canada 3000, it operated one roundtrip flight per week with an aircraft that had 327 seats, while the 12 roundtrip flights per week that scheduled air carriers operated between Hawaii and Australia offered a combined capacity of 2,571 seats.

The Enforcement Office and Canada 3000 have agreed to settle this matter. Canada 3000 admits the violations alleged by the Enforcement Office and consents to the issuance of this Consent Order, which orders the carrier to cease and desist from further violations of this nature in the future. Ordinarily, it is the policy and practice of the Enforcement Office to assess a substantial compromise civil penalty in cases involving operations by an air carrier without the requisite authority, in the interest of deterring future violations by the respondent air carrier and by other air carriers as well. Under the highly unusual circumstances presented in this particular case, however, the Enforcement Office has decided to settle this matter with a conditional civil penalty of \$25,000 against Canada 3000. At least partly due to severe financial repercussions from the worsening decline in the North American economy and the terrorist attacks on the United States of September 11, 2001, Canada 3000 was forced to cease all flight operations and file for court protection from its creditors under the Canadian corporate bankruptcy and insolvency laws on November 9, 2001. The carrier has advised the Department that it is highly unlikely to be able to raise new capital in an amount sufficient to allow it to resume operations in the foreseeable future.

The civil penalty assessed by this order will thus become due and payable only if and when Canada 3000 resumes operations to or from the United States. In that event, half of the total penalty amount, or \$12,500 shall be due within 60 days after Canada 3000 resumes such operations. The remaining \$12,500 shall be suspended for one year following the carrier's resumption of operations and then forgiven, unless Canada 3000 violates this order's payment or cease-and-desist provisions during that period, in which case the entire unpaid portion of the penalty will become due and payable immediately and Canada 3000 may be subject to further enforcement action.

This order should stand as a strong deterrent to future unauthorized operations by other U.S. and foreign air carriers.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Canada 3000 has violated 49 U.S.C. §41301, 14 CFR §212.9(b)(1), 14 CFR §216.3, and 14 CFR §380.25 by holding out and

engaging in foreign charter air transportation without the requisite authorization;

3. We further find that by engaging in the conduct specified in paragraph 2 above, Canada 3000 has engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. §41712;
4. We order Canada 3000 to cease and desist from further violations of 49 U.S.C. §41301, 14 CFR §212.9(b)(1), 14 CFR §216.3, 14 CFR §380.25, and 49 U.S.C. §41712 as specified in paragraphs 2 and 3 above;
5. We assess Canada 3000 \$25,000 as a compromise of civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3 above. Of this amount, payment of \$12,500 is due within 60 days after Canada 3000 resumes service to or from the United States. The remaining \$12,500 shall be suspended for one year following Canada 3000's resumption of service and then forgiven, unless Canada 3000 violates this order's cease-and-desist or payment provisions within that time, in which case the entire unpaid portion of the civil penalty shall become due and payable immediately and Canada 3000 may be subject to further enforcement action. Failure to pay the penalty as ordered will also subject Canada 3000 to the assessment of interest, penalty, and collection charges under the Debt Collection Act; and
6. If and when it becomes due, payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the United States Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)